

**ATAIN SPECIALTY INSURANCE  
COMPANY, a Michigan Corporation,**

No. C 18-07314 WHA

**Plaintiff,**

GREEN EARTH MANAGEMENT, LLC.

## **ORDER GRANTING MOTION FOR DEFAULT JUDGMENT**

## Defendant.

## INTRODUCTION

In this insurance action, plaintiff moves for default judgment. For the reasons stated herein, the motion is **GRANTED**.

## **STATEMENT**

Defendant Green Earth Management, LLC is a wood-chipping and green-waste recycling business in San Jose. In November 2017, a fire of unknown cause broke out on its property. At the time, it had an insurance policy from plaintiff Atain Specialty Insurance Company. The policy provided coverage for Green Earth's building or personal property, business income or extra expenses, and specific equipment. Under each part, the policy stated that coverage would be void in any case of fraud, misrepresentation, or intentionally concealed material facts. On the same day as the fire, Green Earth notified Atain of property loss and allegedly demanded payment for damage resulting from "suspected arson." Green Earth supported its claim with an

1 expense report alleging loss to real and personal property along with lost income and extra  
2 expenses (Dkt. No. 22 at 4–11).

3 Atain retained forensic accountants to review Green Earth’s report of income loss.  
4 Atain also used an independent adjuster and fire consultant to assist in investigating the rest  
5 of the reported damage. The adjuster and consultant interviewed Green Earth personnel and  
6 inspected the premises from November 2017 through January 2018. During the investigation,  
7 Atain “determined that Green Earth’s claim was rife with intentional material misrepresentations  
8 regarding losses under both Coverage Parts” (Dkt. No. 32 at 8, 13–15).

9 After adjusting the claim amounts, Atain made three payments to Green Earth which  
10 collectively amounted to \$83,326.05. With each payment, Atain reserved the right to adjust or  
11 seek reimbursement for amounts not covered by the policy. Because Green Earth subsequently  
12 disagreed with the amount paid under the policy, Atain demanded an appraisal. Both parties,  
13 however, agreed to suspend the appraisal because Green Earth amended its claim in August  
14 2018. Although Green Earth adjusted some amounts, Atain alleges that the amended claim  
15 still contradicted the damages calculated in its investigation (Dkt. No. 22 at 11–14).

16 In December 2018, Atain filed a complaint for declaratory judgment and reimbursement  
17 and served Green Earth two weeks later. Originally assigned to Magistrate Judge Nathanael  
18 Cousins, this action was reassigned to the undersigned because Atain did not consent to the  
19 jurisdiction of a magistrate judge. In February 2019, the clerk entered default against Green  
20 Earth. Green Earth failed to respond to Atain’s complaint and failed to appear at the case  
21 management conferences in March and April 2019 (Dkt. Nos. 1, 8, 11, 14).

22 On April 5, 2019, Atain filed an amended complaint and served Green Earth by process  
23 server three days later, rendering an answer due by April 29, 2019 (Dkt. No. 23). On April 25,  
24 2019, an order required Atain to notify Green Earth’s prior counsel in “attempt to promptly alert  
25 defendant of the possibility of a default judgment” (Dkt. No. 25). Five days later, Atain moved  
26 for entry of default against Green Earth on the ground that Green Earth failed to appear or  
27 otherwise respond to the amended complaint (Dkt. No. 27). The clerk entered default judgment  
28 against Green Earth on May 1, 2019. On October 23, 2019, Atain moved for default judgment.

1 Green Earth “has been effectively unreachable throughout this litigation” (Dkt. No. 25).  
2 This order follows oral argument.

3 **ANALYSIS**

4 **1. DEFAULT JUDGMENT.**

5 After entry of default, a court may exercise its discretion to grant default judgment on  
6 the merits of the case. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980); *see also*  
7 FRCP 55. The factual allegations of the complaint, except those concerning damages, are  
8 deemed to have been admitted by the non-responding party and are taken as true. *Geddes v.*  
9 *United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977). The following factors may be considered  
10 in determining whether or not to enter default judgment: (1) the possibility of prejudice to the  
11 plaintiff, (2) the merits of plaintiff’s substantive claim, (3) the sufficiency of the complaint,  
12 (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material  
13 facts; (6) whether the default was due to excusable neglect, and (7) the strong policy underlying  
14 the Federal Rules of Civil Procedure favoring decisions on the merits. *Eitel v. McCool*, 782 F.2d  
15 1470, 1471–72 (9th Cir. 1986).

16 The majority of the *Eitel* factors support default judgment. *First*, if this motion were to  
17 be denied, then Atain would likely be left without a remedy given Green Earth’s failure to  
18 appear or otherwise defend this action. *See Pepsico, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d  
19 1172, 1176–77 (C.D. Cal. 2002) (Judge Nora Margaret Manella). *Second*, Atain properly served  
20 Green Earth with both complaints and there is no evidence in the record that Green Earth’s  
21 failure to appear and otherwise defend this action was the result of excusable neglect. *Third*, the  
22 sum of money being sought by Atain is reasonable in that it is “directly proportional to the harm  
23 that [Atain] suffered in paying out insurance policy benefits” for Green Earth’s  
24 misrepresentation and fraudulent claims (Dkt. No. 32 at 12). *Fourth*, because Green Earth has  
25 not answered the complaint or otherwise appeared in this action, the possibility of a dispute  
26 concerning material facts is unknown. *Finally*, a decision on the merits is impossible due to  
27 Green Earth’s failure to respond.

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Having determined that on balance the *Eitel* factors discussed above support Atain's motion, this order turns to the merits of Attain's substantive claims and the sufficiency of the evidence (the second and third *Eitel* factors). These factors require Attain to state a claim on which it may recover. *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978).

The amended complaint states three claims for relief. *First*, Attain seeks declaratory judgment that it has no duty to indemnify Green Earth for any additional amount under the policy with respect to the amended claim and that it has either overpaid for the claim or owes nothing pursuant to the terms and conditions of its policy. *Second*, Attain seeks declaratory judgment that Green Earth engaged in fraud, intentional concealment, or misrepresentation of material fact with respect to the claim and amended claim. *Finally*, Attain asks for monetary judgment against Green Earth for reimbursement and restitution of benefits unjustly paid under the policy in the amount of \$83,326.05 (Dkt. No. 22 at 24–27).

Attain supports its claim that Green Earth misrepresented material facts with well-documented evidence gathered from the investigation conducted by independent adjusters juxtaposed with Green Earth's inconsistent claims. If this allegation of fraud and misrepresentation is true, then Attain would not be obligated to indemnify Green Earth because the policy would subsequently be rendered void. Attain brings sufficient evidence to support these claims and Green Earth has never responded. Attain's first two claims, therefore, state a claim on which it may plausibly recover on its merits. In sum, after careful consideration of all of the *Eitel* factors, Attain is entitled to default judgment on its first two claims against Green Earth.

## 2. DAMAGES.

Once default is entered, the well-pled factual allegations in the complaint are taken as true, except for those relating to the amount of damages. *Heidenthal*, 826 F.2d at 917–18. “[N]ecessary facts not contained in the pleadings, and claims which are legally insufficient, are not established by default.” *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992); *see also DIRECTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 854 (9th Cir. 2007). A court has “wide latitude” and discretion in determining the amount of damages to award upon default

1 judgment. *James v. Frame*, 6 F.3d 307, 310 (9th Cir. 1993). Atain must provide evidence of  
2 its damages, and the damages “must not differ in kind, form, or exceed in amount, what is  
3 demanded in the pleadings.” Rule 54(c).

4 Our court of appeals holds that an insurer is entitled to recover the “full payment made  
5 under the policy” if the policy “provides that it is void if the insured misrepresents any material  
6 fact” and it is determined that the insured violated the provision. *Perovich v. Glens Falls Ins.*  
7 Co., 401 F.2d 145, 147 (9th Cir. 1968). Atain’s motion for default judgment seeks \$83,326.05  
8 for “restitution of benefits paid under the Policy to which Green Earth was not entitled” (Dkt.  
9 No. 32 at 10). This amount is the full payment Atain gave to Green Earth in connection with  
10 Green Earth’s original claim. Because Atain seeks reimbursement in “the amount that it paid  
11 to Green Earth under the Policy in response to this claim before it discovered the fraud”, Atain is  
12 entitled to the full amount claimed (*id.* at 12).

13 **CONCLUSION**

14 For the reasons stated above, the motion for default judgment is **GRANTED**.  
15 Judgment shall be entered separately.

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17 **IT IS SO ORDERED.**

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19 Dated: December 9, 2019.

20   
WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE

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